IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 479 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

and

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AHMEDABAD MUNICIPAL CORPORATION

Versus

P R PATEL

Appearance:

MR RR MARSHALL for Petitioner

MR HARDIK C RAWAL for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE B.C.PATEL

and

MR.JUSTICE C.K.BUCH

Date of decision: 13/12/2000

CAV JUDGEMENT

(Per : MR.JUSTICE C.K.BUCH)

Admit.

1. Learned counsel appearing for the parties have agreed to argue the matter at length and on merits. So we have heard the parties on merits at the admission stage and we are inclined to decide the entire appeal on merits, considering the request.

2. This Appeal From Order is preferred by the original defendant - Ahmedabad Municipal Corporation of Civil Suit No. 5631 of 1995 filed in the City Civil Court at Ahmedabad challenging the notice dated 14/6/1995 served under section 260 of the Bombay Provincial Municipal Corporations Act (hereinafter refered to as 'the Act' or 'BPMC Act') to the respondents original plaintiffs. The appellant and respondents herein are referred to hereinafter as defendant and plaintiffs respectively for the sake of convenience.

3. By filing the Civil Suit the plaintiffs challenged the legality and validity of the notice served by the defendant - Corporation and had prayed that the statutory notice under section 260 of the Act should be quashed and set aside and the same may not be implemented. In the said civil suit the plaintiffs have also filed application Exh. 6 under Order 39 Rule 1-2 of the Civil Procedure Code praying for the stay of the implementation of the notice. After perusal of the plaint and the documentary evidence the learned Chamber Judge granted status-quo in terms of para. 10 (a) of the application exh. 6 till the hearing of the notice of motion and directed both the parties accordingly vide ad-interim order dated 8/11/1995. The learned trial Judge hearing the application for interim relief on merits allowed the application and granted prohibitory orders in terms of para. 10 (a) of the application exh.6 till the hearing and final disposal of the suit vide order dated 15/7/1998. The same is challenged by this Appeal From Order.

4. Grievance of the defendant Corporation is that the Court below has not considered the fact that the Corporation had served the notice for removal of an illegal construction and the plaintiffs could not prima-facie prove the construction referred in the show cause notice was otherwise authorised and/or legal. The grievance of the defendant Corporation is that the conclusion drawn by the learned Judge that the impugned notice has been issued by an officer who has no power or authority to issue the same, is wrong andgrave error has

been committed in not appreciating an important aspect that the Deputy Estate and City Improvement Officer and Deputy Town Development Officer are with the same rank and of same status, power and authority. During the course of arguments it was also pointed out by the learned counsel appearing for the defendant Corporation that the post of the Deputy Estate and City Improvement Officer is abolished and Deputy Town Development Officers are enjoying the same powers and the status of the post abolished. So it would not be legal or proper to say that statutory notice served to the plaintiffs by the Deputy Town Development Officer was a notice issued by an officer not authorised or empowered.

5. The learned City Civil Judge has not discussed the contentions of the Corporation qua the offending construction and has granted the interim relief enlarging the legality and validity of the show cause notice served u/S. 260 of the Act.

6. The learned Counsel appearing for the defendant Corporation has pointed out that the Commissioner of the defendant Corporation has delegated its powers to the Deputy Estate and City Improvement Officer vide office ordre no. 4006 dated 30/3/1991. It is neither the finding nor the case that the Commissioner had no authority or power to delegate its statutory authority or power to any subordinate. This is not a case of delegation of power by a delegated authority. It is argued before us that when the post of Deputy Estate and City Improvement Officer is abolished and the Deputy Town Development Officers holding the similar status and post are enjoying the same powers which were enjoyed by the officers designated as Deputy Estate and City Improvement Officers and thus the learned Judge ought not to have held that the officer who has signed the notice mark 35/1 was not authorised to issue such notice.

7. The learned counsel appearing for the plaintiffs Mr. Hardik Raval has raised the very point which was argued before the learned City Civil Judge and has submitted that there is nothing on record to show that the officer who has signed the show cause notice mark 35/1 was specifically authorised by the Commissioner of defendant Corporation and he was the delegated authority to issue such notice. He also argued that notice served by an unauthorised officer renders the notice invalid and no steps could be taken under such notice. If such notice is implemented or enforced forcibly, then the entire suit would frustrate. He has also tried to submit that irrespective of the pendency of the suit the

Municipal Corporation could have served a fresh notice u/S. 260 of the Act through the Commissioner or the officer authorised by the Commissioner. The finding of the learned City Civil Judge, according to Mr. Raval, is strictly in accordance with law and, therefore, the appeal should be dismissed.

8. On careful consideration of the submissions made before us, we are of the view that there is enough force in the submissions advanced by Mr. R.R. Marshal, Ld. counsel appearing for the defendant Corporation.

9. We have considered the averments made in the plaint and the relevant paragraph seeking interim prohibitory orders. The suit seems to have been filed on 6/11/1995. On that day the learned Chamber Judge initially issued notice to the otherside, and despite of serious allegations, no ex-parte ad-interim relief was granted. On 8/11/1995 the ad-interim injunction was granted mainly considering the endorsement made by the learned advocate Mr. P.T. Sheth appearing for the defendant Corporation. Thus the order granting ad-interim relief also cannot be said to be an order passed on merits or on consideration of the facts averred in the plaint. It seems that as the defendant Corporation was intending to file detailed reply the status-quo order was invited by the counsel appearing for the Corporation and on merits the Corporation resisted the application. Para. 5 of the plaint shows that reasonable opporotunity of being heard was given to the plaintiffs. Though notice to show cause was served to the plaintiffs on 23/6/1995, they approached the Corporation for the first time on 4/7/1995 and asked for the time. The Corporation gracefully granted 7 days time. It is contended by the plaintiffs that on 6/7/1995 defendant Corporation granted 7 days time. The plaintiffs are not clear even in the suit as to why the time granted by the defendant Corporation was inadequate. On the contrary the amendment made in the plaint as per the order below exh. 24 dated 12/8/1997, we are of the view that the plaintiffs were waiting for change in the policy of the Corporation and were anticipating the regularisation of their illegal/irregular or unauthorised construction. On 17/7/1995 the plaintiffs have asked for certain explanations from the defendant Corporation, but they have failed to bring on record all these relevant documents. The notice mark 35/1 considered by the learned trial Judge is self explanatory and the Corporation, after offering all opportunities to the plaintiffs took the decision on 16/9/1995. Statutory notice dated 20/9/1995 has been served to the

Corporation, but ultimately the case of the plaintiffs rests mainly on the point of legality and validity of the show cause notice.

10. It is undisputed that the reasonable opportunity is given to the plaintiffs. This is a case of non-compliance of statutory notice served by the defendant Corporation u/S. 260 of the Act. We agree that the notice is not sent by the Commissioner of the defendant Corporation, but an officer empowered by the Commissioner, as a delegated authority, has sent the notice to the plaintiffs. Mr. Marshal has rightly submitted that the Corporation serves such notice after careful consideration of all relevant facts. Drafter of the notice and the Deputy Engineer of the Corporation, Assistant Town Development Officer and Deputy City Development Officer used to sign such notice. The reference of office order delegating powers to other officers by the Commissioner is also normally mentioned in the notice. It is not the case of the plaintiffs that the construction which was suggested to be demolished or removed by the Corporation was an authorised construction or that the case is of very minor irregularity. It is not the case of the plaintiffs that legality or validity of the notice was challenged before the Corporation on the first day on which they approached the Corporation on 4/7/1995, when they had prayed for extension of time. We are inclined to accept version of the Corporation that the post of Deputy Estate and City Improvement Officer has been abolished and the officer who has signed the notice to show cause served to the plaintiffs is holding the similar post. Fact of abolition of post of Deputy Estate and City Improvement Officer brought to the notice of the Court is not resisted. Careful reading of the affidavit filed by the plaintiffs respondents takes us to the conclusion that this is a case of implied admission of the fact that unauthorised construction does exist. It is contended that to the best of the knowledge of the deponent the Government of GUjarat has already granted permission to the Ahmedabad Municipal Corporation for regularisation of irregular and unauthorised construction by charging proper impact fees. Mr. Marshal learned counsel appearing for the Corporation has submitted that no such decision was taken by the Corporation on the date of the service of the notice u/S. 260 of the Act, even today no such policy exists. The plaintiffs were obliged not to erect any unauthorised or illegal construction and such construction was in existence even on the day of the suit. So according to us the learned trial Judge has committed a grave error in holding that the plaintiffs have prima facie case or the balance of convenience in

their favour.

11. Even for the sake of arguments the technicality raised by the plaintiffs is accepted even then when reasonable opportunity, well in advance was offered to the plaintiffs and when this technical defence was not agitated before the Corporation on the first day on which the plaintiffs approached the Corporation on 4/7/1995 and when the plaintiffs have not tried to justify their act of construction by placing proper documents, the learned trial Judge ought to have held that the balance of convenience is not in favour of the plaintiffs. According to us there is no prima facie case in favour of the plaintiffs and this is a case where, for the sake of argument, it is held that for want of production of office order for abolishing particular post of Deputy Estate and City Improvement Officer, by the defendant Corporation, technical plea taken by the plaintiffs may get some strength. This fact situation cannot be equated with or termed as strong prima-facie case. The totality says that plaintiffs have no case even on the point of balance of convenience and/or irreparable loss. When the Corporation had served a notice to show cause well in advance to the plaintiffs in the month of July 1995 and the Corporation voluntarily has not executed the notice to show cause till September 1995, we are of the view that all reasonable opportunities have been offered by the defendant Corporation and, therefore, there should not be any prohibitory injunction against the Corporation if Corporation intends to implement or execute the notice.

In the result, the appeal shall have to be allowed. The judgment and order below exh. 6 in Civil Suit No. 5631 of 1995 dated 15/7/1998 is hereby quashed and set aside and the interim relief granted by the learned trial Judge is vacated. Order accordingly. We can award the cost to the appellant - defendant Corporation, but considering the totality of the facts and circumstances of the case, no cost is awarded.

[B.C. PATEL, J.]

[C.K. BUCH, J.]

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